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IN THE

Supreme Court of the United States

October Term, 1962

No. 300

SOCONY MOBIL OIL COMPANY, INC.,
Petitioner

v.

BROOKLYN UNION GAS COMPANY, ET AL,
Respondents

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

The three questions presented by Socony Mobil Oil Company ("Mobil") on page 3 of its petition are not in fact raised by the record in this case for the following reasons:

1. Mobil's first question as to whether, under Section 4 of the Natural Gas Act, a rate not filed with the Federal Power Commission is invalid and unlawful is not present

in this case. The question here involved is the unlawfulness of a *change* in rate by a natural gas company without having filed notice of the increase with the Federal Power Commission as required by Section 4(d) of the Natural Gas Act and Order No. 174-A of the Federal Power Commission.

2. Mobil's second question, whether the Federal Power Commission may by regulation exercise the power to establish rates, is nothing more than an attempt to relitigate the validity of Order No. 174-A of the Federal Power Commission, which it had unsuccessfully attacked in the case in which the stay order was issued, *Magnolia Petroleum Company v. Federal Power Commission*, 236 F. 2d 785 (C.A. 5, 1956) cert. denied 352 U.S. 968, and that case as to Mobil is res judicata.

3. Mobil's third question assumes that the court below exercised "* * * power primarily and exclusively given by the Natural Gas Act to the Federal Power Commission to determine lawfulness, i.e., justness and reasonableness, of such contract price, * * *". (Mobil's Petition, p. 3). That is not the fact. District Court said:

> "The court may decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. Magnolia Petroleum Company v. Texas Illinois Natural Gas Pipeline Company, S.D. Tex., 1954, 130 Fed. Supp. 890. By finding the lawful rates as established by order of the Federal Power Commission, the court is not fixing any just or reasonable rate or granting reparations." (Mobil's Appendix, p. 21a, R. 661, 662).

The Court of Appeals for the Fifth Circuit said:

> "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations." (Mobil's Appendix, p. 4a, R. 837)

On page 8 of its application Mobil states that its "* * * contention that contract rates collected could not be attacked sprang not from the stay order, but solely from the lack of power of both courts below to determine lawfulness of such rates * * *." Therefore, there is but one narrow question before the court: May an independent producer of natural gas, by the simple expedient of not filing rate shedules and notice of increased rates with the Federal Power Commission, escape the prohibition contained in Section 4(d) of the Natural Gas Act and Federal Power Commission Order No. 174-A against changes in rates without filling such schedules and thereafter retain the amounts collected pursuant to the unfiled rate increase?

STATEMENT

This is a companion case to No. 303, *Marathon Oil Company v. Brooklyn Union Gas Company*, et al.; No. 339, *Transcontinental Gas Pipeline Corp., v. Brooklyn Union Gas Company, et al*; and No. 344, *Brooklyn Union Gas Company, et al. v. Transcontinental Gas Pipeline Corp.*, all filed at this term. The four cases were a single case in the District Court and, although separately docketed, were considered and decided together by the Court of Appeals and are before this Court on a single record.

Respondent cannot accept the statement of the case by Mobil in its petition for, by design or accident, it misstates

or misinterprets the facts and is misleading. Respondents adopt the clear and succinct statement of the facts set forth in the opinion of the District Court of June 29, 1960, Petitioner's Appendix, page 12, which was in effect adopted by the Court of Appeals, Petitioner's Appendix, page 2. For the convenience of the Court, it is reprinted here:

"These consolidated proceedings consist of actions in which plaintiffs, who are distributors of natural gas in eastern seaboard areas, seek restitution of monies paid by defendant Transcontinental Gas Pipe Line Corporation (Transco) to defendants Socony Mobil Oil Company, Inc. (Mobil) and The Ohio Oil Company (Ohio) through increases in price for natural gas sold and delivered to Transco. The case is submitted upon the pleadings, affidavits, and motions for summary judgment of all parties concerned.

"Transco operates under certificate from the Federal Power Commission an interstate natural gas pipe line from Texas to New York. Prior to June 7, 1954, Transco entered into separate natural gas purchase and sales contracts with Mobil and Ohio, covering natural gas from the West Gueydan Field in Vermillion Parish, Louisiana, and from the North Markham-North Bay City Field in Matagorda County, Texas, respectively. The Mobil contract included a 'favored nations' clause providing for increases in price, while the Ohio contract contained a provision for periodic and tax reimbursement price increases. Prior to June 7, 1954, Transco commenced purchasing gas under these contracts, commingling it with other gas in its line and delivering it to customers, including plaintiffs, along its pipe line. Mobil's contract price on June 7, 1954, was 9.79150 cents per m.c.f., while Ohio's contract price on said date was 8.730376 cents per m.c.f.

"On June 7, 1954, the Supreme Court of the United States held in *Phillips Petroleum Co. v. Wisconsin*, 1954, 347 U.S. 672, 74 S. Ct. 794, 98 L. Ed. 1035, that Phillips, a natural gas producer and gatherer, was a 'natural gas Company' within the meaning of the term as defined in the Natural Gas Act, 15 *U. S. C. A.*, Sec. 717, et seq. Both Mobil and Ohio were and are engaged in the business of producing, gathering, and selling natural gas in interstate commerce. The Phillips decision is applicable to both of them. Thus the rates at which they sell natural gas are subject to regulation by the Federal Power Commission.

"On July 16, 1954, the Federal Power Commission issued its Order No. 174, 19 F.R. 4534. Among other things, this order required every independent producer engaged in the interstate transportation or sale of natural gas since June 7, 1954, to file with the Commission copies of rate schedules setting forth all rates and charges for the sale of natural gas which were in effect on June 7, 1954. The order further provided that no change could be made in these June 7, 1954 rates without first giving 30 days' notice of such change pursuant to Section 4(d) of the Natural Gas Act. Order No. 174-A of August 6, 1954, 19 F.R. 5081, and succeeding amendments, simplified and clarified the procedures by which producers apply for a certificate of public convenience and necessity but did not change the foregoing rate requirements.

"Pursuant to Section 19(b) of the Natural Gas Act, Mobil and Ohio each filed a petition for review of Order No. 174-A in the United States Court of Appeals for the Fifth Circuit, questioning whether the Commission was empowered to regulate the price increase provisions of their contracts with Transco as changes in rate. These petitions

sought a stay of that order concerning operations of Mobil and Ohio, including their contracts with Transco. In November 1954 a stay of Order No. 174-A as to Mobil and Ohio was issued by the Court of Appeals. Later, on June 30, 1956, the petitions for review were dismissed, though certificate of the opinion and judgment to the Federal Power Commission was stayed by the court to permit the filing of applications for certiorari in the Supreme Court of the United States, which applications were denied on January 14, 1957. After denial of certiorari, the stay orders were dissolved on February 1, 1957. *Magnolia Petroleum Company, et al v. Federal Power Commission*, 5 Cir., 1956, 236 Fed. 2d 785.

"Only after denial of certiorari did Mobil and Ohio file their Transco contracts with the Federal Power Commission as rate schedules or otherwise. During the pendency of the stay order from February 1, 1955, through January 31, 1957, charges were made to Transco by both Mobil and Ohio in excess of the rates which were in effect on June 7, 1954. Though made pursuant to the price increase provisions of the Transco contracts, such charges were made without giving 30 days' notice thereof to the Federal Power Commission and to the public in accordance with the provisions of Section 4(d) of the Natural Gas Act and as required by Order No. 174-A. The amounts involved in this controversy are the payments in excess of the rates in effect on June 7, 1954, made by Transco to Mobil and Ohio during the period from February 1, 1955, through January 31, 1957.

"On November 26, 1954, Transco filed rate schedules with the Federal Power Commission providing for increases in the rates to be charged by Transco to plaintiffs and other

public utility and industrial customers for natural gas service. Another filing seeking additional increases was made by Transco on January 20, 1955. The Federal Power Commission consolidated these matters and commenced hearings on June 20, 1955, which continued for some months. Meanwhile the rates filed on November 26, 1954, went into effect on February 1, 1955. With matters in this status, each plaintiff entered into an agreement with Transco on October 5, 1955, for the complete settlement of Transco's rate proceedings before the Federal Power Commission, which was made a part of the record of the proceedings before the Commission.

"On November 7, 1955, the Federal Power Commission issued an order approving the proposed rate settlement. Among other things this order contained the following specific provision:

" 'In the event any of the suppliers of Transco whose rates are currently in effect under an undertaking or under bond, or whose rates are currently being charged under court stay orders shall be required to make refunds to Transco in respect to gas supplied under such rates, such portion, if any, of said refund attributable to natural gas purchased from said supplying company or companies by Transco, after Transco's increased rates were permitted to become effective to cover such increased cost of gas, shall be refunded to Transco's utility customers within 60 days after receipt of such refund by Transco * * *.'

"Both the agreement and the order provide a detailed method of computing the refund to be paid to each of Transco's utility customers."

In the trial court, each of the parties filed motions for summary judgment. The trial court's memorandum opinion

of June 29, 1960, recognized the Respondents' position as assignees of Transco's cause of action and as the real parties in interest. The Court further held that Respondents were entitled to recover from Mobil and Ohio on the merits of the controversy, because the only effective lawful rates from June 7, 1954, until Mobil and Ohio received approval of different rates from the Federal Power Commission were the contract rates in effect June 7, 1954. In view of this holding, the Court did not reach the question of whether Respondents stated an independent claim against Transco, saying: "Since plaintiffs can recover against Mobil and Ohio, it is unnecessary to determine whether they state an independent claim against Transco arising out of the refund provision of the settlement agreements and order." (R. 665).

The trial court entered judgment that Mobil and Ohio refund the overcharges to Respondents and that Respondents take nothing from Transco.

The Court of Appeals unanimously affirmed the judgment of the trial court, and in substance adopted the opinion of the District Judge as its own.

I.

REASONS FOR NOT GRANTING THE WRIT

Petitioner's application is based upon the misconceived idea that the court below administratively determined Petitioner's rate during the pendency of the stay order and upon the fallacious argument that, because it had not filed any rate schedule with the Federal Power Commission, Petitioner could then lawfully enforce escalated contract rate increases without filing notice of such increases with the Federal Power Commission.

Neither court below took any such administrative action for, as stated by the Court of Appeals:

> "As the appellees correctly state in their brief, the court below did, and we may, decide the merits of this controversy by recognizing and determining the lawful rates on June 7, 1954. By finding what were the lawful rates in this case, the court below was not fixing any just or reasonable rate or granting reparations." (Petitioner's Appendix p. 4a, R. 837).

It is equally clear that under the Natural Gas Act and Order 174-A the only lawful rate of an independent producer of natural gas from June 7, 1954 until the filing of a different rate with the Federal Power Commission was the contract rate in effect on June 7, 1954. This is true even though the contract rate was unfiled. Any change provided for in the contract, whether filed or unfiled, by virtue of a "favored nations" or "escalation" clause or otherwise, constituted a rate change which under the Natural Gas Act and the applicable regulations of the Federal Power Commission is forbidden in the absence of compliance with the filing and notice provisions of the Act and regulations. *Natural Gas Pipe Line Co. of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957) cert. denied 356 U. S. 957; *Bel Oil Corp. v. Federal Power Commission*, 225 F. 2d 548 (C.A. 5, 1958) cert. denied 358 U.S. 804; *Episcopal Theological Seminary v. Federal Power Commission*, 269 F. 2d 228 (C.A. D.C., 1959) cert. denied 361 U.S. 895; *Cities Service Gas Producing Company v. Federal Power Commission*, 233 F. 2d 726 (C.A. 10 1956) cert. denied 352 U.S. 911; *Natural Gas Pipe Line Co. v. Federal Power Commission*, 253 F. 2d 3 (C.A. 3 1958) cert. denied 357 U.S. 927.

The courts below did not hold, as stated by Petitioner on page 11, "that a producer's failure to file a contract with attendant rate invalidity, created a category and area in which the courts could determine lawfulness and adjudicate the consequences without impinging upon power exclusively given the Commission by the Act to determine lawfulness." As previously pointed out, the courts merely determined what was the effective lawful rate in the absence of filing and giving notice of a changed rate pursuant to Order No. 174-A and Section 4(d) of the Natural Gas Act.

Petitioner also confuses "effective lawful rate" and "just and reasonable rates." They are not necessarily the same rate unless the Commission has been given the opportunity to exercise its functions under Section 4(d) of the Act. Here Mobil deliberately sought to evade the provisions of Section 4(d) and Order No. 174-A by litigation and the stay order, and now, with the litigation lost and the stay order expired, seeks to retain excess unlawful rates collected during the life of the stay order. To follow Mobil's position would be to hold: (a) that the contract rate in effect on June 7, 1954 may be changed without filing under Section 4(d); and (b) that the stay order administratively determined rates during its pendency, a power denied to the courts as recognized by both courts below. (Petitioner's Appendix, pp. 4a, 6a, 7a and 21a, R. 837, 839, 840, 662.)

The decision below does not, as suggested by Petitioner (Mobil's Petition p. 11), present "broad and highly important questions of construction of the Act and the substitution of judicial dictate for the administrative determination stipulated by the statute, contrary to the decisions of this Court," because, so far as we know or can determine

only Mobil and Ohio, the Petitioners in Nos. 300 and 303, proceeded to collect increased contract rates under stay orders without filing the increases with the Federal Power Commission and no other independent producers are known to be involved. All independent producers are now operating under the provisions of Order No. 174-A as well as Section 4(d) af the Natural Gas Act, and the exact question in these cases can never again arise.

Petitioner places no reliance on the stay orders to protect it in retaining its increased rates on page 8 of its petition stating that:

> "Mobil's contention that contract rates collected could not be attacked sprang not from the stay order but solely from the lack of power of both courts below to determine lawfulness of such rates, a power granted by the Act exclusively to the Commission."

And on page 10,

> "Realistically evaluated its decision demonstrates the stay order affected nothing, protected nothing."

Since Petitioner places no reliance on the stay order, its position must be that so long as an independent producer's rates are unfiled, even now, its contract rates, however escalated, can be lawfully charged and collected in utter disregard of Order No. 174-A and Section 4(d) of the Natural Gas Act.

Even Ohio recognizes and admits that without the stay order Mobil and Ohio would not have any semblance of a right to rates in excess of those in effect on June 7, 1954. As Ohio said at page 6 of its Reply Brief in the trial court:

"Of course, if the Court stay had not been granted, and if Ohio had not made any rate filing and had not given the notice required by Order No. 174-A, the June 7, 1954 price would have been and would have remained the lawful price."

II

THE DECISION BELOW IS CLEARLY CORRECT

As previously stated an unbroken line of cases in various circuits supports the decision by both courts below that the only lawful rate from June 7, 1954, until Mobil received approval from the Federal Power Commission of a different rate was the contract rate in effect on June 7, 1954. This is true even though the contract was unfiled. Any change provided for in the contract, whether filed or unfiled, by virtue of a "favored nations" or "escalation" clause, or otherwise, constitutes a change in rates, which is forbidden in the absence of filing with the Commission. *Natural Gas Pipe Line Co. of America v. Harrington; Bel Oil Corp. v. Federal Power Commission; Cities Service Gas Producing Co. v. Federal Power Commission; Amerada Petroleum Corp. v. Federal Power Commission; Episcopal Theological Seminary v. Federal Power Commission; Natural Gas Pipeline Co. v. Federal Power Commission;* all supra.

The cited cases point out that companies such as Mobil were under Commission jurisdiction from the inception of the Natural Gas Act, but that neither the Commission nor the companies recognized that fact until the decision of this Court in the *Phillips'* case on June 7, 1954. The Commission was faced with the necessity of a beginning date, and in order to prevent inequitable retroactive adjustments, the Commission and the courts have applied that date as the cut-off date of price changes without filing.

Both courts below held that the stay order issued by the Court of Appeals did not adjudicate any rights to any specific rates, but merely preserved the status quo. Admittedly, it temporarily relieved Mobil of the necessity of filing its contracts with the Commission.

When the stay order was dissolved, a duty of restitution arose. *Arkadelphia Milling Co. v. St. Louis S.W. Ry. Co.*, 249 U.S. 134, 145; *Berthold-Jennings Lumber Co. v. St. Louis, I. M. & S. Ry. Co.*, 80 F. 2d 32 (C.A. 8, 1935) cert. denied 297 U.S. 715; *Cleveland v. Tufts*, 69 Tex. 580, 7 S.W. 72 (1888). Mobil was then under a duty to restore the amounts in excess of the June 7, 1954 rate collected during the pendency of the stay.

But aside from the fact that a stay order does not adjudicate rights, but merely preserves the status quo, *Scripps Howard Radio v. Federal Communications Commission*, 316 U.S. 4, Mobil now states that it places no reliance on the stay order (Mobil's Petition, pp. 8 and 10). This makes the task of this Court even easier.

Mobil would ask this Court to say that no court, including the courts below, has the power to determine what was the effective lawful rate at any given time. This could only mean that courts are without power to determine the rights of parties to contracts and that a person who is overcharged must look elsewhere than to the courts for relief. The very origin of courts of law was based largely upon an effort to eliminate the necessity for self help in such situations and the chaotic consequences which flowed therefrom.

The fact that courts can recognize, determine, and give effect to the lawful rate at any given time is also made apparent by the decision of this Court in *United Gas Pipe*

Line Co. v. Mobile Gas Service Corp., 350 U.S. 332, 347, when the Court said:

> "Any amounts paid by Mobile in excess of the contract rates on the basis of the erroneous order of the Commission were therefore unlawfully collected, and United is obligated to make restitution of the excess payments."

III

THERE IS NO ISSUE OF GENERAL IMPORTANCE NECESSARY FOR THIS COURT TO CONSIDER

By its Point I, Mobil atempts to reduce Sections 4(c) and 4(d) of the Natural Gas Act to "notice sections only", with Section 4(c) requiring filing of contracts and Section 4(d) prohibiting change only in contracts "previously filed." It is urged that the antecedent of "such" in Section 4(d)'s prohibition of change in any "such rate" is "the rate already on file by Section 4(c)." This is clearly erroneous.

Section 4(c) requires the filing of "*schedules*" showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission." (Italics supplied.) The reference in Section 4(d) is, therefore, to "such" rate for any "sale subject to the jurisdiction of the Commission." If the reference had been to "previously filed rates or contracts," Section 4(d) would have used the word "schedule". This is shown by the fact that Section 4(c) requires filing "schedules" showing rates, Section 4(d) requires filing "new schedules," and Section 4(e) concerns Commission action with respect to a "new schedule." Nowhere does Section 4 refer to the filing of "rates."

All of the courts of appeals cases previously cited establish that the rate initially filed with the Commission must be the rate in effect on June 7, 1954, even though, in some cases, price increases called for in the contract had already gone into effect prior to filing. If the prohibition against change applied only to "previously filed rates," then it would not have been necessary for the companies to file at the June 7, 1954, level, but they could have filed at the new level called for by the contract.

Mobil's reliance upon *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332, and *United Gas Pipe Line Co. v. Memphis Light, Gas & Water Division*, 358 U.S. 103, is misplaced, as neither supports Mobil's construction of the Act. *Mobile* involved an attempt by United to unilaterally change its contract with Mobile, which had been filed with the Commission. The Court held that Section 4(d) did not give United the power to change its contract unilaterally, and did not create a method, apart from the contract, of establishing new rate schedules. After summarizing the regulatory scheme, the Court said at 350 U.S. 343:

> "No more is necessary to give full meaning to all of the provisions of the Act: consistent with this, §4(d) means simply that *no* change—neither a unilateral change to an ex parte rate nor an agreed-upon change to a contract—can be made by a natural gas company without the proper notice to the Commission."

In *Memphis*, the Court reaffirmed its holding in *Mobile*, but said that under a different contract which provided for the sale of gas at the "going" rate, United could file new schedules providing for rates which had not specifi-

cally been agreed upon by United's customers. In *Memphis*, unlike *Mobile*, United had complied with all of the duties imposed by the Act. The holding below is squarely in line with this Court's decisions in *Mobile* and *Memphis*. Mobil's argument that, despite the stay, the Commission had "ample power to enforce and compel filing" (Mobil's petition, p. 14) is patently ridiculous. When by its stay the Court of Appeals for the Fifth Circuit had relieved Mobil from the requirement of filing pending judicial review of Order No. 174-A, what court, under Section 20 or 22 of the Act, would have disregarded the stay and ordered Mobil to file? Contrary to Mobil's statement that Order No. 174-A is "a procedural regulation applicable only after filing," Order No 174-A prescribes the procedure and time for filing, and throughout this case all parties have agreed that under the stay Mobil and Ohio did not have to file.

Mobil also tries to conjur the word "lawful" into a term of art under the Act, with no meaning other than any rates which are 'just and reasonable." On the contrary, the terms are not synonymous. As this Court said in *Montana-Dakota*, 341 U.S. at 251: "We hold that the right to a reasonable rate is the right to the rate which the Comission files or fixes, and that, except for review of the Commission's orders, the courts can assume no right to a different one on the ground that, in its opinion, it is the only or the more reasonable.

According to Mobil's definition, any rate that is just and reasonable and not preferential is lawful, whether filed or unfiled. In this case, there is no issue with respect to the justness and reasonablenes of the rate Mobil collected; that is totally irrelevant. Even assuming they were just and reasonable, the increased prices were unlawful because unfiled.

The Commission might have approved increased rates, but it was never given the opportunity to act because there was no filing.

In the *Mobile* case there was no question with respect to whether the rates were just and reasonable, and the Commission had erroneously permitted the increased rates to become effective. This Court said that the rates were "unlawfully collected," without discussing whether they were just and reasonable. 350 U.S. at 347. There the rates were unlawful because of the absence of contractual authorization for the increase. Here the rates were unlawful because of the absence of filing with the Commission. And Mobil expressly states that it does not rely on the stay order's relieving it from the obligation to file as protection for collection of the increased rates.

Mobil also manufactures a conflict between the opinion below and the case of *Natural Gas Pipe Line Co. of America v. Harrington*, 246 F. 2d 915 (C.A. 5, 1957), cert. den. 356 U.S. 957, and *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F. 2d 380 (C.A. 9, 1953). In *Harrington* the Court held that the contract rate, even though unfiled, was the only "lawful" rate (not "just and reasonable" rate) until changed by order of the Commission. Without Commission approval, the rate could not be changed. (The subsequent Fifth Circuit case of *Bel Oil Corp. v. Federal Power Commission*, 255 F. 2d 548 (C.A. 5, 1958), cert. den., 358 U.S. 804, established that even changes in rate provided for in the contract are, subsequent to June 7, 1954, "rate changes" subject to the prohibition of Section 4(d).) The court stated it could not look into the past and retroactively fix a "just, reasonable, and lawful rate" different from that established as the lawful rate under the Act. And neither did the court attempt to

fix a "just, reasonable, and lawful rate" in this case. It merely recognized and enforced the rate established under the Act as the only lawful rate. There is no conflict with *Harrington.*

The *Interstate Natural Gas* case was not a rate case, but an action for damages for refusal by the defendant to transport in its pipeline, operating under certificate from the Commission, the gas belonging to the plaintiff. The question of rates arose only because the plaintiff, in an effort to avoid the defense of failure to exhaust administrative remedies, contended that the Commission did not have jurisdiction because the defendant had not filed rate schedules. The court held that there were rate schedules on file, and even if there had not been, the Commission would have had jurisdition. The case is not relevant here, except to the extent that it holds that Commission jurisdiction cannot be avoided merely by failure to file rate schedules. There is no conflict with *Interstate.*

The misinterpretation of Section 4(d) by Mobil and the absence of the alleged conflict of decision demonstrate that Mobil has not raised any issue of importance under its Point I.

IV

THERE IS NO FEDERAL QUESTION OF IMPORTANCE AND NO CONFLICT OF DECISIONS

In its Point II, Mobil declares that there is presented a federal question of importance, but the question does not in fact exist, because the point is based upon a misstatement of the decision below. Mobil states that the court below disregarded Mobil's contract with Transco, changed the

contract, and at the same time, somehow, both vested the Commission with authority to fix rates and usurped powers granted solely to the Commission.

In fact, the court below recognized and enforced the contract rate in the only way available to it under the law. The court enforced the contract rate in effect on June 7, 1954. Under all of the relevant decided cases, the contract rate as of June 7, 1954, was the rate which Mobil was initially required to file. In fact, when Mobil eventually filed its rate schedule in 1957, the filing was accepted by the Commission at the rate level in effect on June 7, 1954. (R. 585). Subsequent price increases, even though provided for in the contract, constituted changes in rates which the court could not enforce because they were prohibited by Setion 4(d). *Bel Oil Corp. v. Federal Power Commission; Cities Service Gas Producing Co. v. Federal Power Commission; Episcopal Theological Seminary v. Federal Power Commission;* all *supra.* It is true that the rates are initially set by contract, but even rate changes contractually provided for may not be freely put into effect. The restrictions and limitations of the Act must be satisfied first.

The court below did not, as Mobil states, hold that Order No. 174-A fixes and makes rates, but it did hold that Section 4(d) prohibits changes in rates without filing. Mobil can raise a question only by ignoring the fact that the court below considered Section 4(d) of the Act. When Section 4(d) is raised, Mobil's question falls.

The holding in *Magnolia Petroleum Co. v. Federal Power Commission,* 236 F. 2d 785 (C.A. 5, 1956) cert. denied 352 U.S. 968, the case in which the stay was granted, is declared by Mobil to be in conflict with the decisions below. No conflict with that case exists, and the court there an-

ticipated this consequence of its decision. In this case the court did not hold that Order No. 174-A was a "self-executing adjudicatory order making and establishing rates," but is completely in harmony with the *Magnolia* case, where the Court said that if Mobil was subject to Commission jurisdiction and Order No. 174-A, it was not by reason of anything contained in that order, but because Mobil's operations were such as to bring it under Section 4 of the Natural Gas Act. Mobil has done nothing to take itself out from under the Act and is subject to Section 4(d) requirements.

The court below is not in conflict with the decision in *Willmut Gas & Oil Co. v. Federal Power Commission*, 294 F. 2d 245 (C.A. D.C., 1961), cert. denied 368 U.S. 975, because that case is irrelevant. It merely held that the Commission could not refuse to accept for filing new rate schedules permitted by the Act merely because there were already on file previous schedules still undisposed of.

By letter of August 6, 1962, counsel for the Petitioner advised the Clerk of this Court that he had discovered the case of *H. L. Hunt, et al v. Federal Power Commission*, decided by the Fifth Circuit on July 19, 1962. He stated that he believed the *Hunt* case supported his Point II and that it presented an intra-circuit conflict. He invited the Respondents to comment upon the case because he will discuss it in his reply brief.

In *Hunt* the Commission erroneouly denied the producers the right to file notice of increases under Section 4. Here the Commission invited the producers to exercise their right to file notice of increased rates under Section 4. Mobil did not accept the invitation, but instead sought a stay order as a means of ignoring Commission jurisdiction and the provisions of Section 4(d) of the Act.

Since Mobil has misstated the decision below, it is apparent that the question based on that misstatement does not in fact exist, and that no conflict of decisions in fact exists.

V

MOBIL'S POINT III IS IRRELEVANT

Mobil's Point III consists of a discussion of the courts' lack of jurisdiction under the Natural Gas Act to award reparations for past unjust and unreasonable rates, and the point is, therefore, completely and totally irrelevant to the case before this Court.

Nowhere did Respondents allege, and nowhere did either court below hold, that the rates collected were unjust and unreasonable. Nowhere did the Respondents seek, and nowhere did either court below award, judgment for the difference between the rate collected and what was considered to be a just and reasonable rate. This is a case, not of reparations, but of restitution. Therefore, none of the cases cited by Mobil require any discussion here.

Mobil argues that the decision below creates a form of jurisdictional wasteland in which "courts could move to exercise the primary jurisdiction of the Commission," but rather than demonstrating this contention discusses the irrelevant subject of reparations. In fact, the position that Mobil is urging would, if upheld, itself create a wasteland inhabited, not by the courts, but by natural gas companies. Although Mobil allegedly places no reliance on the stay order, by means of the stay Mobil would have successfully avoided Commission jurisdiction for over two years, with complete freedom to increase its prices without scrutiny or restraint by the Commission, and would therefore be immune to all attempts by its customers to recover the

overcharges. Certainly neither the Natural Gas Act, the decisions under the Act, nor the stay issued by the Fifth Circuit were ever intended to produce such a result.

CONCLUSION

Respondents respectfully submit that this case involves only one simple question - the effect of the stay order issued by the Court of Appeals for the Fifth Circuit. In the absence of the stay, there is no question but that Mobil would have had to file its rate schedules and file new schedules seeking price changes, or else have faced severe criminal penalties for failure to file. Although Mobil states that it does not rely on the stay, if the stay were removed from this case we submit that Mobil would not be contending that it could have freely increased its rates. But the result should be the same in either case, because the stay did not adjudicate any rights. The court which issued the stay has now spoken. It has declared the effect of its own order. In so doing it has created no important questions of federal law.

In view of the foregoing, Respondents respectfully pray that the petition for writ of certiorari by Socony Mobil Oil Company, Inc. should be denied.

Respectfully submitted,

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September 6, 1962